IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

W.A. Sumanawathi,
Kadulawa, Ibbagamuwa.
17th Defendant-Respondent-Petitioner

CA (Rev) 14/2013
NWP/HCCA/KUR/126/2005(F)
DC Kurunagala 1727/P

Vs.

Herath Mudiyanselage
Premarathna,
Kandulawa Road,
Ibbagamuwa.
Substituted Plaintiff-Respondent-Respondent
& Several Other Parties

Before: Mahinda Samayawardhena, J.

Counsel: Rasika Dissanayake for the 17th Defendant-Petitioner.
B.O.P. Jayawardena for the Substituted Plaintiff-Respondent.
Sudharshani Cooray for the 1A Defendant-Respondent.

Argued &

Decided on: 15.11.2018

Samayawardhena, J.

This is an application for revision and/or *restitutio in integrum* filed by the 17th defendant-petitioner dated 17.12.2013 seeking to set aside the Judgment of the District Court of Kurunagala in Case No. 1727/P dated 10.06.1991, the Order of the District Court of Kurunagala in the same case dated 06.07.2005 and the Judgment of the High Court of Civil Appeal of Kurunagala in Case No. 126/2005(F) dated 09.11.2011.

This is a partition action. The Judgment of the District Court has been delivered on 10.06.1991. No appeal has been filed against the Judgment.

In the Judgment, 1/12 share of the land has been left unallotted. This portion has been depicted as Lot 3 in the Final Partition Plan.

The 17th defendant (together with 16, 18-22 defendants) has made a joint application to the District Court dated 02.02.2005, claiming the said unallotted Lot upon the facts stated therein. After the inquiry, the learned District Judge has partly allowed that application by Order dated 06.07.2005. The 17th defendant has not appealed against that Order.

Being aggrieved by this Order, the 16, 18-22 defendants have gone before the High Court of Civil Appeal of Kurunagala, but the High Court of Civil Appeal by Judgment dated 09.11.2011 has affirmed the Order of the District Court. There is no appeal to the Supreme Court from that Judgment of the High Court of Civil Appeal.

One of the reliefs sought by the 17th defendant before this Court is to set aside the said Judgment of the High Court of Civil Appeal. In the first place, the 17th defendant was not an appellant in the appeal filed before the High Court of Civil Appeal. In any event, this relief cannot be granted as this Court has no jurisdiction to sit in appeal over the Judgments of the High Court of Civil Appeal by way of a final appeal, revision or *restitutio in integrum*. Only the Supreme Court has that jurisdiction. This Court and the High Court of Civil Appeal have concurrent or parallel jurisdiction over the Judgments and Orders of the District Court—vide my Judgment in *Munasinghe v. Ariyawansa* CA/RI/15/2018 delivered on 02.11.2018. The learned counsel for the 17th defendant informs Court that he does not pursue that relief.

The substantive relief sought by the 17th defendant is to set aside the Judgment of the District Court entered more than 22 years ago. This he seeks on the basis that the learned District Judge has failed to investigate the title to the land! It is interesting to note that the 17th defendant does not specifically state the share he is entitled to, nor such a relief has been prayed for in the prayer to this application. It may be recalled that the 17th defendant was given a share (but not the full share she expected) from the unallotted Lot when she made the application to the District Court.

The learned counsel for the 17th defendant drawing attention to section 25 of the Partition Law, No.21 of 1977, as amended, and case law, submits that, as this is a partition action which is an action in *rem*, the moment this Court realizes that the District Judge has failed in his duty to properly investigate the title to

the land, whether it is shown by a party or not, and whether there is a delay or not, it is incumbent on this Court to set aside the Judgment of the District Court. I cannot agree with that submission. There cannot be a uniform rule of that nature, and that shall depend on facts and circumstances of each individual case.

In this case, the petitioner has been made a party as the 17th defendant about 5 years after the registration of the Final Decree. He, at that time, accepted the Judgment and made his claim (together with some other parties) to only Lot 3 of the Final Partition Plan, which has been left unallotted. His application was partly allowed, and the appeal preferred against that Order was dismissed. Can the 17th defendant, more than 2 years after the Judgment of the High Court of Civil Appeal, and more than 8 years after the Order of the District Court, and more than 22 years after the Judgment of the District Court, now file this revision application seeking to set aside the Judgment of the District Court on the basis that the District Judge has failed to investigate the title to the land? I would most certainly answer that question in the negative. I do not say that the District Judge has failed to investigate the title. In my view, in the facts and circumstances of this case, consideration of that question simply does not arise.

As Chief Justice Sansoni stated in *Cassim v. Government Agent, Batticaloa*[1] "*There must be finality in litigation, even if incorrect orders have to go unreversed.*"

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[1] (1966) 69 NLR 403 at 404

I must also emphasize that parties cannot present their cases or take up defences in piecemeal.

Section 6 of the Civil Procedure Code says that "*Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action.*"

Section 34(1) and (2) of the Civil Procedure Code reads thus:

1) *Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any court.*

2) *If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.*

The doctrine of *res judicata* applies to all matters which existed at the time of giving the judgment and the party had an opportunity of bringing before Court.

In *Banda vs. Karohamy*[2], Justice Nagalingam with Chief Justice Howard agreeing stated: "*I am inclined to think that the doctrine of res judicata applies to all matters which existed at the time of*

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[2] (1948) 50 NLR 369 at 373

the giving of the judgment and which the party had an opportunity of bringing before the Court. In this case it is quite obvious that the present plaintiff had the fullest opportunity of bringing before the Court his claim of title to the land based upon the conveyance (P1), for at the date he filed answer the title conveyed by P1 had vested in him and there was nothing to prevent him from pleading that title as well. The present plaintiff not having done so and not having obtained an adjudication upon that title in the former suit, the decree in that suit must therefore be deemed to operate as res judicata in regard to the present assertion of his claim. For these reasons I hold the judgment of the learned District Judge is right. The appeal therefore fails and is dismissed with costs." (vide also Jane Nona v. Mohamadu[3], Sinniah v. Eliakutty[4])

The doctrine of *res judicata*, as Justice Bandaranayake (later Chief Justice) in *Stassen Exports Ltd v. Lipton Ltd*[5] expressed, has found justification in two fundamental principles: "*The first principle, which is public in nature, is based on the maxim interest rei publicae ut sit finis litium (in the interest of the state that there be an end to litigation) and secondly on the footing of a maxim, private in nature, namely, nemo debet bis vexari pro un at eadem causa (that no person should be proceeded against twice for the same cause).*"

This is a revision application. Revision is a discretionary remedy. The application, in my view, is misconceived in law. I refuse the application of the 17th defendant with costs.

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[3] (1932) 1 CLW 158 per MacDonell CJ
[4] (1932) 1 CLW 253 at 254 per Jayawardene AJ
[5] [2009] 2 Sri LR 172 at 185

Before I part with this Judgment, I shall mention about the application made by the 1A defendant, namely, W.A. Anura Keerthi, whereby he seeks to challenge the aforementioned Order (not the Judgment) of the District Court and the Judgment of the High Court of Civil Appeal on the ground that he was not aware of the inquiry into the Lot 3 of the Final Partition Plan, which was left unallotted. He says that he is entitled to some rights from that Lot. He has not made an application to the District Court regarding it, nor had he been a party to the appeal made to the High Court of Civil Appeal. The learned counsel for the 1A defendant states that a reference has been made in the Judgment of the High Court of Civil Appeal about the claim of the 1A defendant. If that is the case, as I stated at the outset, this Court has no jurisdiction to review the said findings.

In *Hotel Galaxy (Pvt) Ltd v. Mercantile Hotels Management Ltd*[6], the Supreme Court (led by Chief Justice Sharvananda) citing *Loku Menika v. Selenduhamy*[7], *Habibu Lebbe v. Punchi Etana*[8], *Caldera v. Santiagopulle*[9], *Weeratne v. Secretary, D.C. Badulla*[10], *Dingirihamy v. Don Bastian*[11], *Bank of Ceylon v. Liverpool Marine & General Insurance Co Ltd*[12], *Nagappan v. Lankabarana Estates Ltd*[13] held that: "*A party seeking to canvass an order entered ex-parte against him must apply in the first instance to the court which made it. This is a rule of practice which has become deeply ingrained in our legal system.*"

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[6] [1987] 1 Sri LR 5
[7] (1947) 48 NLR 353
[8] (1894) 3 CLR 85
[9] (1920) 22 NLR 155 at 158
[10] (1920) 2 CL Rec 180
[11] (1962) 65 NLR 549
[12] (1962) 66 NLR 472
[13] (1971) 75 NLR 488

In *Jana Shakthi Insurance v. Dasanayake*[14] Justice Wimalachandra stated: "*It is settled law that a party affected by an order of which he had no notice must apply in the first instance to the Court which made the order. The petitioner must first file the necessary papers in the original Court and initiate an inquiry into the allegations made by him. After such inquiry, if the petitioner is dissatisfied with the order made by the District Court, he can thereafter raise the matter before the Court of Appeal. The Court of Appeal then would be in a position to make an order on the issues after taking into consideration the order made by the District Court."* In *Penchi v. Sirisena*[15] also Justice Wimalachandra took the same view.

This dispute seems to be between 1A defendant on the one hand, and the 14th and 15th defendants on the other. That is a different dispute, which has no relevance to the application of the 17th defendant-petitioner.

Subject to making any application before the District Court, if so advised, the application of the 1A defendant is dismissed without costs.

Judge of the Court of Appeal

[14] [2005] 1 Sri LR 299 at 303
[15] [2012] 1 Sri LR 402 at 408